IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1848

TRIBUNE PUBLISHING COMPANY and
JAMES E. SHELLEDY, *Petitioners,*

v.

MICHAEL A. CALDERO, *Respondent.*

IN RE SHELLEDY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Brief Amicus Curiae of THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, in Support of Petitioners

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The Idaho Supreme Court ruled that Branzburg v. Hayes denied any First Amendment protection for the identities of confidential news sources and therefore the assertion of this First Amendment right must always yield to the state statutory right of pre-trial discovery.

It is the position of the Amicus that the Idaho Supreme Court decision contradicts this Court's recognition of the importance of confidential news sources in Branzburg v. Hayes; contradicts the ruling of most state and federal courts which have recognized the balancing test theory of Branzburg v. Hayes; contradicts the philosophy of New York Times v. Sullivan, protecting news organizations from per se liability unless there is a showing of recklessness; and contradicts the rulings of three U.S. Courts of Appeals, starting with Garland v. Torre, that the libel plaintiff has a substantial evidentiary burden to meet before forcing the news organization to disclose its sources.

Therefore, the specific question in this case is whether a state pre-trial discovery rule grants a public official libel plaintiff an absolute right to force disclosure of confidential news sources even though the news organization has offered substantial evidence that the article was done carefully, and even though the public figure libel plaintiff has offered no evidence to rebut the presumption of care and offered no balancing test evidence of compelling need.

It is the position of the Amicus that the Idaho Supreme Court decision, if permitted to stand, will encourage frivolous and harrassing libel suits against the press filed only to discover confidential news sources.

The news organization and news reporter will be helpless to defend because the Idaho Supreme Court has rejected the concept that the libel plaintiff must make any initial showing of malice and necessity before obtaining the forced disclosure.

In view of the importance of this question to the First Amendment doctrines of Branzburg v. Hayes and New York Times v. Sullivan and in view of the conflict on this question between the Idaho Supreme Court and the U.S. Courts of Appeals, Amicus urges this Court to grant the petition for a writ of certiorari so that public figure libel plaintiffs, news organizations and the public may have some guidance as to what the law is in this vital First Amendment area.

OPINIONS BELOW

The District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah, rendered no opinion. The opinion of the Supreme Court of the State of Idaho, not yet officially reported, is set forth in Joint Appendix A filed by the parties.

CONSENT OF THE PARTIES

All parties to this litigation by their attorneys, have consented to the filing of this brief.

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a legal defense and research fund specializing in defending the First Amendment interests of the working press, and it has extensive expertise regarding the importance of protecting confidential news sources from the viewpoint of the working news reporter. The Committee has submitted briefs and memoranda Amicus Curiae before this Courtin a number of important First Amendment cases, including Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974) (stay granted); Times-Picayune Publishing Corp. v. Schulingkamp, 420 U.S. 985 (1975)(dismissed as moot); Rosato v. Superior Court, cert. denied,427 U.S. 912 (1976); United States v. Dickinson, cert. denied,414 U.S. 979 (1973); Oklahoma Publishing Co. v. District Court, rev'd, ___ U.S. ___, 45 U.S.L.W. 3599 (U.S. March 7, 1977).

The Reporters Committee believes it can present this Court with important facts and arguments not brought to this Court's attention in the Petitioners' brief and appendix on the high standard of journalistic care employed by the newspaper and news reporter.

Based on these facts, the Amicus believes that there is substantial argument to be made for the protection of the confidential news sources in this case.

QUESTIONS PRESENTED

1. Whether the Idaho Supreme Court was correct in ruling that the First Amendment offers no protection for confidential news sources sought in civil cases under Branzburg v. Hayes and Garland v. Torre.

2. Whether the Idaho Supreme Court was correct in ruling that the First Amendment permits a public figure libel plaintiff to obtain confidential news sources without making any showing of malice or any threshold "balancing test" showing of necessity to obtain the information.

3. Whether the Idaho Supreme Court was correct in ruling that a strong and unrebutted showing of journalistic care in the publication of a news article is no defense under the First Amendment to a demand by a public figure libel plaintiff for confidential news sources.

4. Whether this Court should grant review of this case in order to resolve the increasing confusion regarding protection for confidential news sources in libel cases stemming from conflicting decisions by three United States Courts of Appeals and two state supreme courts to date.

STATEMENT OF THE CASE

1. Background of the Article at Issue

This case involves a classic investigative reporting effort by a small daily newspaper, The Lewiston (Idaho) Tribune (circulation 25,000), into a highly controversial state agency, the Idaho Bureau of Narcotics and Organized Crime.

A. The Six-Part Series

Starting in 1972 the state agency was subjected to increasing criticism for its operations. As a result, the Lewiston Tribune assigned a reporter, Jay Shelledy, to investigate the agency.

This investigation took place over a period of several months beginning in September 1973 and resulted in the publication of a six-part series about the agency. Lewiston Tribune -- Sept. 15, 1973, p. 1; Sept. 29, p. 1; Oct. 4, p. 1; Nov. 18, p. 5; Jan. 28, 1974, p. 1; Jan. 30, p. 1. The controversy about the Bureau was chosen by the Idaho Associated Press as the most significant news event of the year. (Lewiston Tribune, Dec. 27, 1973, p. 2).

The general conclusions reached by the newspaper in its investigation were that agents were poorly trained and the agency was poorly supervised.

B. The Law Enforcement Assistance Administration and Colorado Bureau of Investigations Reports

During the controversy over the Bureau, the agency was assessed in depth by two outside government agencies: the Law Enforcement Assistance Administration of the Department of Justice (LEAA) and the Colorado Bureau of Investigations.

The LEAA report was never made public in its entirety but it was reported on January 28, 1974 (Lewiston Tribune, p. 1) that the LEAA "performance audit stains Idaho Narcotics Bureau". The report criticized the agents' training and management.

Two days later, on January 30, the Colorado Bureau of Investigation report reached similar conclusions about poor agent training and management. (Lewiston Tribune, p. 1).

C. Results

As a result, the State Attorney General discharged the Chief of the Bureau and four other top officials, including the libel plaintiff in this case, Michael Caldero, and his partner, agent Terry Perkins (Lewiston Tribune, Jan. 30, p. 1), both of whom were involved in the incident which prompted this libel suit.

2. The Article in Question

A. The Incident

On August 27, 1972, George Booth asked a friend, Dale Johnson, to drive him to a parking lot in a public park in Coeur d'Alene, Idaho, to keep an appointment.

Booth left the car to meet two men who later turned out to be undercover agents, plaintiff Michael Caldero and Terry Perkins.

Johnson remained in the car, parked in a parking lot. The two agents attempted to arrest Booth, who resisted.

Johnson said he thought his friend was being assaulted by "hippies" and started to flee.

At this point there is a dispute in the stories. Caldero said he identified himself as a policeman, showed his badge,and told Johnson to stop the car, and that Johnson attempted to run the officer over, whereupon Caldero shot Johnson three times, allegedly in self-defense. (See A. App. A, G)

Johnson said that Caldero did not identify himself, but merely ran up to the car and shot three times. He said he was not attempting to strike Caldero with the car.

B. The Publicity at the Time

After the incident, police released a short statement reporting that Dale Johnson had been injured while police were arresting a "suspected dope pusher". There was no indication at the time from police that the incident was other than a routine drug arrest. No assault charges were filed against Johnson. (See A. App. A).

Both men were convicted on drug charges. Johnson received probation.

3. The Investigation by the Newspaper: Its Evidence of Journalistic Care

The details of the investigation by Shelledy and the close supervision of the investigation by the Editor, the Editorial Page Editor and the Managing Editor are carefully outlined in a series of documents, including affidavits, the story itself, and a deposition by Shelledy. (See A. App. B, Deposition of James E. Shelledy; A. App. C, Affidavit of James E. Shelledy; A. App. D,

Affidavit of Ladd Hamilton, Managing Editor of the Tribune; A. App. E, Affidavit of A.L. Alford, Editor and Publisher of the Tribune; A. App. F, Affidavit of William D. Hall, editorial page editor for the Tribune; and A. App. G, Defendants' Brief.)

In brief, Shelledy recounted a vigorous investigation of the incident, including a two-day trip to Coeur d'Alene, inspection of many documents, and about 12 interviews. Included among those interviewed were the victim's attorney; members of the victim's family; the victim's employer; the County Sheriff; the County Prosecuting Attorney; the Coeur d'Alene Police Chief; a resident narcotics agent in Coeur d'Alene; the Chief of the State Narcotics Bureau; the Assistant Chief of the State Narcotics Bureau; the State Attorney General; two eyewitnesses who were unconnected to either the victim or the agent; and an unnamed "police expert". (See A. App. C.)

The reporter made efforts to obtain the police investigation reports of the incident but Coeur d'Alene police would not release the information. (See A. App. A.) He obtained the permission of the Attorney General and the County Prosecutor to interview the two agents, but the Chief of the Bureau ordered them not to talk to the newspaper. (See A. App. B.)

The newspaper, hoping to obtain a Caldero interview, offered to permit the agent to see the article before it was printed, and held up publication for more than two weeks in the hope it could obtain the interview.

4. The Article As Published

The article as published (see A. App. A) gives both sides of the incident, although most persons interviewed appear to support the victim's version of what occurred.

The State Attorney General was quoted as saying the shooting was a "mistake", and that in all likelihood Caldero "got a little shook up".

The County Prosecutor, who had access to reports unavailable to the newspaper, was quoted as saying that he "doesn't feel Johnson is the type who would do what Caldero charged".

The unnamed police expert -- who was used in previous stories and considered by the newspaper to be reliable (see A. App. B)-- said that, based on all the facts, Caldero's "justification for shooting didn't add up".

One eyewitness passerby contested the agent's statement in many respects, saying that Caldero did not verbally identify himself, did not say halt, or show any ID. This eyewitness and a companion also said that at no time was Caldero in danger of being run down. "He just ran up to the car and pumped three shots through the windshield." (See A. App. A.)

5. The Libel Suit

After the article was published, agent Caldero filed suit for libel claiming that the article was an "unfair, false, and malicious account".

In subsequent court papers, the agent did not accuse the newspaper of misquoting anyone but appears mainly to have taken issue with Shelledy's assessment of the facts and the statements by the unnamed police source that Caldero's version "didn't add up" and by the State Attorney General that Caldero "got a little shook up".

6. Demand for Confidential News Source

During this pre-trial stage, Caldero subpoenaed the reporter under Idaho pre-trial discovery rules. (Idaho Code §9-201, §9-1301). The reporter answered many questions in detail in a 30-page deposition (see A. App. B) but declined to produce his confidential "police expert". Shelledy was then added as a defendant.

The newspaper made a motion for summary judgment, producing the articles, the affidavits, and the deposition to raise the inference that it had published the story carefully and in good faith.

The trial judge indicated he would grant summary judgment (Joint App., p. 4a) were it not for the refusal to disclose the source.

The trial court held the reporter in contempt and sentenced him to 30 days in jail, staying execution of the judgment pending appeal.

7. The Idaho Supreme Court

The Idaho Supreme Court, in upholding the contempt judgment, ruled that "no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version..." under Branzburg v. Hayes. (Joint App. at 13a)

It further said that "we read the opinion of Mr. Justice Stewart as rejecting both alternatives" in Garland v. Torre. Id. at 8a.

Therefore, the Idaho Supreme Court concluded that no showing of necessity under the "balancing test" was required in order to obtain the disclosure order, and that the unrebutted showing by the newspaper as in this case

could not defeat the disclosure order.

There were two dissents.

Justice Donaldson would have imposed the "balancing test". He observed that "there is some doubt that the majority believes First Amendment freedoms are even implicated." Id. at 23a.

Justice Bakes would have reversed the order, saying: "because I do not believe that the article in question is defamatory of Caldero, I conclude that it would serve no purpose to allow discovery of the police expert and that in this case the interest in discovery is outweighed by the newsman's First Amendment privilege". Id. at 42a.

Petitioners then sought review by writ of certiorari in this Court.

SUMMARY OF ARGUMENT

We respectfully suggest that the time has come for this Court to take up the question of the extent to which the First Amendment protects confidential news sources sought in civil litigation, especially libel cases.

It has now been six years since this Court decided Branzburg v. Hayes and ruled that three reporter eyewitnesses to the commission of serious crimes must go to jail or compromise their First Amendment interest in protecting the confidentiality of their news sources.

In the interim, this Court has had several opportunities to amplify Branzburg and has declined to do so. Baker v. F & F Investment Co., 470 F.2d 778 (2d Cir. 1972), cert.denied, 411 U.S. 966 (1973); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert.denied, 417 U.S. 938 (1974); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir.), cert. denied, 409 U.S. 1125 (1972); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976); Rosato v. Superior Court of Fresno County, 51 Cal. App. 3d 190 (1975), cert. denied, 427 U.S. 912 (1976).

Meanwhile, a debate has arisen on what Branzburg means. Generally, the federal courts, relying strongly on Mr. Justice Powell's concurrence, have ruled that Branzburg establishes, at a minimum, a "balancing test" in both civil and criminal cases which requires some showing by the person seeking the sources that the disclosure is relevant, essential to the underlying cause of action, and not obtainable through other non-press sources.

But two State Supreme Courts, Idaho and Massachusetts, have ruled that Branzburg offers absolutely no qualified privilege to protect news sources, and therefore the person seeking the information need make no showing of any type before obtaining a disclosure order.

This general conflict has been duplicated specifically in the libel field where federal appeals courts -- relying on Branzburg v. Hayes, Garland v. Torre and New York Times v. Sullivan -- have ruled that a public figure libel plaintiff seeking confidential news sources must make a threshold showing that the news organization was reckless before obtaining the disclosure order.

The result of the Idaho decision -- which rejects both the balancing test and the resulting threshold showing test -- is to leave the news organization and news reporter constitutionally defenseless when pre-trial discovery is demanded of confidential news sources, regardless of how improbable the libel claim.

On both a constitutional and practical level, the Idaho Supreme Court establishes an almost irrebuttable presumption of the right to force disclosure of confidential news sources and offers no presumption or burden of proof protection for the First Amendment values involved because the Idaho Supreme Court states there is no such First Amendment value.

Therefore, it is the contention of the Amicus that this Court should either summarily reverse the Idaho Supreme Court decision as an unwarranted violation of the First Amendment rights of the press under Branzburg v. Hayes and New York Times v. Sullivan, or it should grant the petition for a writ of certiorari

In order to resolve the confusion and conflict between the Idaho and Massachusetts Supreme Court decisions of no qualified privilege on the one hand and the positions of the United States Courts of Appeals for the Second, Fifth, Eighth and Ninth Circuits and District of Columbia Circuits that there is a qualified privilege under a "balancing test" or threshold showing rule.

I. THIS COURT, ALL LOWER FEDERAL COURTS AND MOST STATE COURTS HAVE RULED THAT THERE IS A STRONG FIRST AMENDMENT INTEREST IN PROTECTING THE IDENTITIES OF CONFIDENTIAL NEWS SOURCES.

The Idaho Supreme Court ruling, that there is no First Amendment interest in protecting the identities of confidential news sources, contradicts the rulings of this Court in Branzburg v. Hayes and the rulings of all federal courts and most state courts which have dealt with this question.

A. Branzburg v. Hayes

It is clear that the majority in Branzburg v. Hayes, 408 U.S. 665 (1972), specifically recognized that the First Amendment provides "some" constitutional right of the press to protect confidential news sources when it said: "Without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 681.

The fifth majority vote was cast by Mr. Justice Powell in his separate concurring opinion which said in part:

> The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. [408 U.S. at 709.]

Mr. Justice Powell gave a further explanation of his view of Branzburg in Saxbe v. Washington Post Co., 417 U.S. 843 at 859 (1974), when he said:

> We recognized explicitly [in Branzburg] that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful.

It is the position of the Amicus that "seeking out the news" is certainly one of the "antecedent

activities" of publishing a newspaper, and the protection of confidential news sources is essential to effective newsgathering.

B. Lower Federal Courts

All federal courts which have dealt with the issue of confidential sources have recognized the First Amendment right.

The Court of Appeals for the Second Circuit, in Baker v. F&F Investment Co., 470 F.2d 778 (1972), cert. denied, 411 U.S. 966 (1973), ruled:

> Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis ... The deterrent effect such disclosure is likely to have upon ... investigative reporting ... threatens freedom of the press and the public's need to be informed.[470 F.2d at 782.]

This approach has also been followed by the Fourth Circuit in United States v. Steelhammer, 539 F.2d 373 (1976); by the Fifth Circuit in Poirier v. Carson, 537 F.2d 823 (5th Cir.), rehearing denied en banc, 541 F.2d 281 (1976); by the Eighth Circuit in Cervantes v. Time, 464 F.2d 986, cert. denied, 409 U.S. 1125 (1972); by the Ninth Circuit in Bursey v. United States, 466 F.2d 1059 (on petition for rehearing en banc); and by the District of Columbia Circuit in Carey v. Hume, 492 F.2d 631, cert. denied, 417 U.S. 938 (1974).

The United States District Courts have also consistently ruled that the First Amendment grants at least a qualified protection from the forced disclosure of confidential news sources.

In Gilbert v. Allied Chemical, 411 F.Supp. 505, 50[illegible] (E.D. Va. 1976), the District Court found that "information lost to the press is information lost to the public." See Loadholtz v. Fields, 389 F.Supp. 1299 (M.D. Fla. 1975), and Democratic National Committee

v. McCord, 356 F.Supp. 1394 (D.D.C. 1973).

C. State Courts

Most state courts, citing Branzburg v. Hayes, have ruled in favor of the First Amendment protection of news sources. In People v. Marahan, 81 Misc. 2d 637, 368 N.Y.S. 2d 685 (1975), a New York State Supreme Court held:

> The right to disseminate news in the printed columns of a news organ is necessarily meaningless without the same guarantee extended to the gathering and collection of the news ... To require (the reporter) to respond to the subpoenaes and subject himself to interrogation would perforce compel him not only to divulge his sources of information but to invite an open challenge to the right of newspapermen to write, edit and collect the news. [368 N.Y.S. 2d. at 692.]

Similar rulings have been rendered by the Vermont Supreme Court in State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974); the Virginia Supreme Court in Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429, cert. denied, 419 U.S. 966 (1974); and from the Florida Supreme Court in State v. Morgan, 337 So. 2d 951 (Fla. 1976).

Only one other state supreme court, the Supreme Judicial Court of Massachusetts in Dow Jones & Co., Inc. v. Superior Court, 303 N.E. 2d 847 (1973), agrees with the Idaho Supreme Court that Branzburg v. Hayes provides no privilege of any type under the First Amendment for news organizations and newspersons to protect the identity of confidential news sources.

D. Conclusion

Therefore, it is the position of the Amicus that the Idaho Supreme Court decision must be reversed on its face as a violation of the First Amendment protection of confidential news sources.

II. THE SUPREME COURT, ALL FEDERAL APPELLATE AND TRIAL COURTS, AND MOST STATE COURTS HAVE ESTABLISHED A "BALANCING TEST" WHICH REQUIRES A SHOWING OF "COMPELLING" INTEREST TO OVERRIDE THE FIRST AMENDMENT PRIVILEGE FOR THE PROTECTION OF CONFIDENTIAL NEWS SOURCES.

A. Balancing Test: Branzburg v. Hayes

In Branzburg v. Hayes, this Court recognized the need to balance the First Amendment interest of reporters protecting confidential news sources against the obligation "to respond to grand jury subpoenaes and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 682.

The Court ruled 5-4 that the First Amendment interest in protecting confidential news sources could be breached in those three cases because (a) the information sought by federal and state grand juries involved serious criminal allegations -- threats against the life of the President, potential violence by armed militants and hard drug transactions; (b) the reporters themselves were eyewitnesses to the alleged commission of these serious crimes; and (c) the reporters were the only available witnesses and no alternative non-media witnesses could be found. Branzburg v. Hayes, 408 U.S. at 667, 672, 675.

It is significant that the majority opinion by Mr. Justice White reached this conclusion by balancing the burden that disclosure would place on newsgathering against the importance to the criminal justice system based on the record in the three cases:

> On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential ... burden on newsgathering...." [Id. at 690.]

The Court's approval of the balancing test was further noted by Mr. Justice White when he said that the Attorney General's Guidelines for Subpoenaes to the News Media "are a major step in the direction the reporters ... desire to move" and "may prove wholly sufficicient to resolve the bulk of disagreements ... between press and federal officials." Id. at 707, citing 28 C.F.R. § 50.10 (1976).

These Guidelines, as the Court noted, follow the "balancing test" theory by stating that the Attorney General, in deciding whether to issue a subpoena to the press, should "weigh that limiting effect [on the First Amendment] against the public interest to be served in the fair administration of justice." [408 U.S. at 707 n.41.]

Specifically, these Guidelines require that particular factors be considered in both civil and criminal cases in balancing the interests of the press and of the party seeking disclosure: (1) the information sought to be disclosed must be essential to the underlying litigation, particularly with reference to establishing guilt or innocence; (2) the party seeking disclosure must attempt to obtain the information from alternative non-media sources; and (3) the scope of the information sought must not be so broad as to constitute an undue burden on the news media.

Further, Mr. Justice Powell, the fifth Justice to join the Branzburg majority, granted the First Amendment "balancing test" great weight when he said:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. [Id. at 710.]

Later, in Saxbe v. Washington Post Company, supra, Mr. Justice Powell said that the holding in Branzburg was of a "limited nature" which

> hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated. ...
>
> At some point official restraints ... may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulation in terms more compelling than discretionary authority and administrative convenience. [417 U.S. at 860.]

Therefore, Branzburg only permits limitations upon First Amendment rights to protect confidential news sources when imposed pursuant to an express "balancing of interests" test. The post-Branzburg case law has tended to draw this balance more frequently in favor of First Amendment interests in both criminal and civil contexts.

B. Balancing Test: Criminal Cases -- State

Most state courts have recognized the First Amendment "balancing test" even in criminal cases where the identities of confidential news sources are sought.

Thus, in Brown v. Commonwealth, supra, the Virginia Supreme Court barred a murder defendant from forcing a newspaper reporter to divulge the identity of a confidential news source who had given the reporter an account of the crime. The court held that "the privilege of confidentiality should yield only when the defendant's need is essential to a fair trial." 204 S.E. 2d at 431.

In State v. St. Peter, supra, several drug defendants moved pre-trial to compel a reporter to

disclose his source of information about a drug raid warrant pursuant to which the defendants had been arrested.

The Supreme Court of Vermont held that the reporter was entitled to refuse to answer inquiries put to him because it could not be demonstrated that (1) there were no other adequately available sources for the information sought,and (2) the information sought was relevant and material to the issue of guilt or innocence.

The Court limited the scope of Branzburg to grand jury proceedings and trials and endorsed Mr. Justice Powell's view of the "balancing test":

> The concurring opinion of Mr. Justice Powell suggests that the First Amendment supports enough of a privilege in newsgatherers to require a balancing between the ingredients of freedom of the press and the obligation of citizens, when called upon, to give relevant testimony relating to criminal conduct. [315 A.2d at 255.]

In People v. Marahan, supra, a New York Supreme Court prohibited criminal defendants from compelling a reporter to testify about conversations he had with the arresting officers and to produce any notes or memos that he made at the time of his coverage of a story detailing the arrest of the two defendants and the seizure of weapons. The information supplied by the source indicated a conflict in police testimony regarding the validity of the search warrants used in making the arrests.

Despite the seeming relevance of the source, the court would not apply the "narrow facts" of Branzburg. It pointed out that the information sought involved a matter collateral to the criminal act, and, citing Mr. Justice Powell in Branzburg, held:

> The information sought would not be of sufficient probative value or relevancy to warrant compelling the testimony sought here.

[368 N.Y.S. 2d at 692. See also State v. Morgan, 337 So. 2d 951 (Fla. 1976).]

Even in those few criminal and quasi-criminal cases where reporters have been held in contempt for protecting confidential news sources, the courts imposing the contempt judgments have emphasized the "balancing test" factors outlined in Branzburg. E.g., People v. Dan, 342 N.Y.S. 2d 731 (1973) (reporter eyewitness to inmate deaths during Attica prison riot); Rosato v. Superior Court of Fresno County, 51 Cal.App. 3d 190 (1975), cert. denied, 427 U.S. 912 (1976) (reporter eyewitnesses to violation of grand jury secrecy); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied,427 U.S. 912 (1976); Farr v. Superior Court, 22 Cal. App. 3d 59, 99 Cal. Rptr. 342 (2d Dist. 1971); In re Farr, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (2d Dist. 1974) (reporter eyewitness to violation of court-issued gag order on attorneys).

In all three cases, the state courts emphasized that important state interests in the administration of justice were involved, that the reporters were eyewitnesses, and that no alternative witnesses were readily available.

C. Balancing Test: Criminal Case - Federal

The only United States Court of Appeals to have extensively discussed Branzburg established a "substantial connection" "balancing test" which it read to follow the "compelling state interest" test enunciated in DeGregory, Gibson, and Bates. See page 24, infra.

In Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972), a federal grand jury moved to compel staff reporters of the Black Panther newspaper to give testimony regarding the newspaper's published account of a speech containing an alleged presidential assassination threat.

The Court of Appeals reversed the District

Court and refused to compel testimony, citing First Amendment freedom of press and political association grounds. On petition for rehearing, the court affirmed its holding en banc in light of Branzburg.

The court found that Mr. Justice White's opinion followed the balancing standards enunciated in DeGregory v. Attorney of New Hampshire, 383 U.S. 825 (1966), Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, and Bates v. Little Rock, 361 U.S. 516 (1960). Hence, the court said, the grand jury was required to establish that there was a "substantial connection" between the information sought and the criminal conduct which the government was investigating before a witness could be compelled to answer questions which divulged the identity of persons. [466 F.2d at 1091.]

D. Balancing Test: Civil Cases

The first important recent federal or state case in which a newsperson was subpoenaed to testify in civil litigation was Garland v. Torre, 259 F.2d 545 (2d Cir.) cert. denied, 358 U.S. 910 (1958). This case, which involved an effort to force a news reporter to disclose the source of unfavorable information about the late Judy Garland, established the "balancing test" which has been followed by all federal and most state courts which have dealt with this issue.

Mr. Justice Stewart, then a member of the Court of Appeals, said that each demand for confidential news sources presents the courts with the "delicate and difficult task" of determining whether forced disclosure of confidential information "justifies some impairment of the First Amendment protection" 259 F.2d at 548. The factors that Mr. Justice Stewart relied upon were the relevancy and materiality of the information, the lack of alternative sources of information and whether the information sought went to "the heart of" the plaintiff's case. Id. at 550.

In Baker v. F&F Investment Co., 470 F.2d 778 (2d Cir.), cert. denied, 411 U.S. 966 (1972). a class action was filed under the Civil Rights Acts alleging racial discrimination in the sale of houses in Chicago. Plaintiffs moved for an order compelling disclosure of a journalist's confidential news source during pretrial discovery.

The court recognized the constitutional interest of the journalist, pointing out:

> [T]hough a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest (where First Amendment rights must yield), we are of the view that there are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential source outweighs the public and private interest in compelled testimony. [470 F.2d at 783.]

In upholding the District Court's denial of the motion, the Court of Appeals found that disclosure by the journalist of his source was not essential to protect the public interest in the orderly administration of justice in the courts, nor did the source's identity go to the heart of the appellant's case. Further, the court said that there were other available sources of information which appellants had not exhausted.

Other civil cases which have recognized the Garland, Branzburg, and Baker "balancing test" in determining whether confidential news sources should be disclosed are Apicella v. McNeil Laboratories, 66 F.R.D. 78 (E.D.N.Y. 1975) (disclosure refused because information sought was relevant but not essential to movant's case); Gilbert v. Allied Chemical, 411 F.Supp. 505 (E.D.Va. 1976) (disclosure refused because information sought was "helpful" but not "crucial", and movant could not show "compelling circumstances"); and Poirier v. Carson, 537 F.2d 823 (5th Cir. 1976) (disclosure

refused because information sought was not essential to the cause of action against reporter-party). See Loadholtz v. Fields, supra; Democratic National Committee v. McCord, supra; United States v. Steelhammer, supra; United States v. Liddy, 354 F.Supp. 208 (D.D.C. 1972); Altemose Construction v. Trades Council, No. 73-773 (E.D.Pa., May 16, 1977); Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388 (N.D. Cal. 1976).

E. Balancing Test: Libel Cases

It should be of particular interest to this Court to note that libel case decisions have followed the "balancing test" approach.

As pointed out earlier, the test was initially put forth in Garland v. Torre, supra, and has been applied in both granting and denying requests for forced disclosure of confidential news sources.

Carey v. Hume, supra, involved an accusation based upon information from a confidential source that the plaintiff had improperly removed documents from a union office.

The Court of Appeals for the District of Columbia adopted the "balancing" approach set forth in Garland v. Torre, 492 F.2d at 636. It found that the attempt to determine the source of the statement -- a supposed eyewitness -- went to the heart of the plaintiff's case. Therefore, the court said, the First Amendment considerations were outweighed, but only because the libel arose solely from the confidential source's statement and because there was no way for the plaintiff to know where to locate alternative sources.

A similar approach was taken in Cervantes v. Time, 464 F.2d 986 (8th Cir.), cert. denied, 409 U.S. 1125 (1972). This was a libel action brought by the mayor of St. Louis against the publisher of Life Magazine. The mayor subpoenaed a reporter, seeking the names of confidential news sources

quoted as linking the mayor with organized crime. The Court of Appeals refused to permit forced disclosure of the confidential source. It held that the First Amendment does not grant reporters an absolute privilege to withhold news sources, but that to routinely grant a motion seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would compromise the principles that underlay the line of cases articulating the constitutional basis for a modified privilege. [464 F.2d at 993.]

The two instances of state appellate courts refusing to recognize the "balancing test" enunciated by Garland v. Torre in libel cases are the Idaho Supreme Court in this case and the Supreme Judicial Court of Massachusetts in Dow Jones & Company, Inc. v. Superior Court, 303 N.E. 2d 847 (Mass. 1973).

F. Conclusion

It is the contention of the Amicus that the great weight of constitutional authority clearly establishes the "balancing test" as an essential protection for newsgathering under the First Amendment.

At the least, the conflict that has developed in case law between the United States Courts of Appeals and the Idaho and Massachusetts Supreme Courts requires this Court's review so that news organizations, in attempting to assess their First Amendment rights, will have some guidance.

III. GRANTING A PUBLIC FIGURE LIBEL PLAINTIFF THE RIGHT TO AUTOMATIC PRE-TRIAL DISCLOSURE OF CONFIDENTIAL NEWS SOURCES UNDERMINES THE FIRST AMENDMENT PROTECTION FOR NEWS REPORTING ON GOVERNMENT AS ESTABLISHED BY NEW YORK TIMES V. SULLIVAN AND GERTZ V. ROBERT WELCH, INC.

It is clear that granting a public figure libel plaintiff a virtually irrebuttable right to force disclosure of confidential news sources eviscerates this Court's protection for news reporting and comment on government as laid down in New York Times v. Sullivan, 376 U.S. 254 (1964), and succeeding cases. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

The New York Times doctrine is founded upon "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270.

Therefore, the New York Times doctrine creates a "balancing test" to protect reporting about government by requiring the public official libel plaintiff to show that the article was both false and done with reckless disregard for the truth.

This standard protects the news organization's ability to publish news by disallowing heavy financial damages resulting from frivolous libel suits.

But money awards are not the only type of damage which can burden First Amendment rights by leading "to intolerable self censorship." 418 U.S. 323 at 340 (1974). This Court has long held that forced disclosure of certain types of confidential information can impose an impermissible burden on the exercise of First Amendment rights. NAACP v. Button, 371 U.S. 415 (1963).

In that case, the NAACP argued that its First Amendment rights to freedom of political association were of little use if the government could obtain the names of its members, opening those members to the potentiality of harrassment and intimidation because of their association with the civil rights movement. Here we have a similar situation. A former government official is seeking the name of a confidential government news source, a disclosure which may open the source to harrassment and stop any further cooperation in providing news to the news organization defendant.

This Court must realize -- if only from the confidential source information provided in Watergate -- that its goal of encouraging news and comment about government under New York Times will be severely damaged by the approach taken by the Idaho Supreme Court. Amicus urges this Court to consider the consequences of offering virtually automatic disclosure of confidential news sources in libel cases without imposing any "balancing test" burden on the public figure libel plaintiff.

The result will be to encourage every person identified in an unfavorable light by a confidential news source to file a claim of libel and then automatically obtain pre-trial discovery of the confidential news source without any further showing of the reasonableness of the libel claim.

Under the Idaho Supreme Court ruling, the most frivolous libel claim will be permitted to force disclosure of confidential news sources, authorizing the same type of "strict liability" on the news-gathering process before trial as the New York Times rule prohibits during the trial.

IV. THERE IS NO PRESUMPTION OF "COMPELLING INTEREST" BY A PUBLIC FIGURE LIBEL PLAINTIFF SEEKING CONFIDENTIAL NEWS SOURCES DURING PRE-TRIAL DISCOVERY BECAUSE THERE IS NO FEDERAL OR STATE CONSTITUTIONAL OR COMMON LAW RIGHT TO PRE-TRIAL DISCOVERY.

The protection of confidential news sources under Branzburg v. Hayes and the protection against harrassment in libel cases under New York Times v. Sullivan are both rooted in the federal constitutional guarantee of freedom of the press. But the right of pre-trial discovery has no federal or state constitutional or common law roots.

This precise question was taken up by the Vermont Supreme Court in State v. St. Peter, supra, a case involving an attempt to obtain confidential news sources during pre-trial discovery. It said:

> The right of discovery in Vermont is of great liberality and the law is the better for it, but it is not of constitutional dimension and has no common law equivalent. When it is confronted by policy considerations related to a constitutional privilege, a carefully considered modification in the light of both concerns is in order. [315 A.2d at 256.]

There is a federal Fourteenth Amendment right to due process in state civil trials, but this case has not reached the trial stage yet. The plaintiff here is pursuing a purely statutory discovery right that could be eliminated completely by the Idaho legislature.

Therefore, the state statutory interest at issue here is weak at best. In the proper circumstances, it can be defeated by the assertion of constitutional, common law and other statutory privileges such attorney-client, physician-patient, and priest-penitent -- and in Idaho even counselor-student. (Joint App. A at 6a.)

The news organization in this case is not seeking an absolute privilege. It is merely asking that the public figure libel plaintiff make some reasonable threshold showing that the libel claim has a reasonable expectation of success by offering reliable evidence indicating malice or recklessness and also that the information sought is absolutely essential to the case.

V. THE FIRST AMENDMENT REQUIRES THAT A PUBLIC FIGURE LIBEL PLAINTIFF MAKE A STRONG INITIAL SHOWING OF MALICE BEFORE BEING PERMITTED TO FORCE DISCLOSURE OF CONFIDENTIAL SOURCES BY DEFENDANT.

The Eighth Circuit Court of Appeals, in Cervantes v. Times, Inc., supra, dealt with the specific question of whether the mere filing of a libel suit gives rise to pre-trial forced disclosure of a confidential source. The Court of Appeals held "To routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would atterly emasculate"[the First Amendment]. Id. at 993, 993

In Cervantes, as noted above, the mayor of St. Louis sought the identities of FBI and Justice Department sources of an article tying him to the St. Louis underworld. Life magazine provided extensive affidavits and pre-trial testimony showing it had spent "countless hours" carefully collecting and documenting its data. Id. at 994.

The court found: "Quite apart from the tactics employed in collecting the data for the article, the mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth" Id. at 992 . The court added: "We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources. But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws" Id. at 992-3 .

In balancing the conflicting interests, the Cervantes court placed the burden upon plaintiff to present "persuasive evidence on the issue of malice.... substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports.... Mere speculation or conjecture about the fruits of such examination simply will not suffice" Id. at 994 .

The court further found, based upon the record before it, "an inference that there was good reason for this belief" in the accuracy of the article Id. Thus, the First Amendment considerations were found to be weightier than the need for disclosure. Defendant's showing of care prevailed over plaintiff's bare pre-trial discovery request.

Cases both before and after Cervantes have required a threshold showing of necessity before requiring disclosure of confidential news sources. The leading case is Garland v. Torre, supra.

In Carey v. Hume, supra, a United Mine Workers lawyer was accused by a confidential source of stealing union documents. The lawyer denied the truth of the article. Defendant, reporter Britt Hume, produced no evidence of care, and no alternative sources were available. Absent a showing of care, and given that plaintiff would

have difficulty in proving "that he did not, at any time of day or night over an indefinite period of several weeks, remove boxfuls of documents from the UMW offices" (id. at 637), the information sought was found by the Court of Appeals to be critical to plaintiff's case,and disclosure was ordered.

In Hemingway v. Fritz, 96 Idaho 364, 529 P.2d 364 (1974), an informant at the Fish and Game Commission was the source of information that a public official had allegedly misused privileged information for personal profit. The Idaho Supreme Court found: "It is not clear from reading the supposedly libelous items that a material, false, defamatory statement has been made,... Political epithets and hyperbole leveled against the actions of a public official are within the freedom of expression protected by the First Amendment" Id. at 265-6 . The court dismissed the anonymous informant issue: "Whether such an informant actually existed, what he told Fritz, and how he obtained his information would be of importance if the article were false ....Summary judgment will not be set aside for failure to answer irrelevant interrogatories." Id. at 266 .

For the minority view on this question, see Dow Jones, Inc. v. Superior Court, supra, where the Massachusetts Supreme Judicial Court ruled there was no First Amendment interest in protecting confidential news sources and therefore specifically rejected the threshold showing of "probable merits" as laid down in Cervantes.

A. Threshold Requirements: Summary Judgment and Confidential News Sources.

The requirement that a public figure libel plaintiff make a strong threshold showing of malice in requesting disclosure of confidential news sources is based on the same First Amendment pro-

cedural considerations as the requirement that the libel plaintiff make a strong threshold showing in opposing motions for summary judgment.

Summary judgment is a procedural device to protect the news organization from the financial and First Amendment damage that would result in the perpetuation of a libel case which has no merit on its face. Therefore, the courts have imposed an evidentiary standard requiring the plaintiff to make some showing of the validity of the claim in opposing summary judgment motions.

The identical constitutional interest is involved here, when prior to summary judgment the news organization seeks to protect its First Amendment rights faced with demand for confidential news sources. Without some such protective threshold rule for confidential news sources as in summary judgment motions, the news organization is naked in its effort to raise the First Amendment defense.

The District Court in Meeropol v. Nizer, 381 F.Supp. 29 (S.D.N.Y.), aff'd,505 F.2d 232 (1974), rehearing denied, 508 F.2d 837 (1975), said: "Summary judgment is particularly appropriate at an early stage in cases where claims of libel or invasion of privacy are made against publications dealing with matters of public interest or concern... Plaintiffs cannot defeat the motion for summary judgment by asserting that there is an issue for the jury as to malice unless they make some showing ... from which malice may be inferred" Id. at 32 .

In Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), cert. denied,495 U.S. 922 (1969), the court, in reversing a denial of summary judgment, said: "The subject matter of this litiga-

tion, involving, as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this Court jointly consider that the failure to dismiss a libel suit might necessitate long and expensive trial proceedings which ... would themselves offend the principles enunciated in Dombrowski v. Pfister (citations omitted) because of the chilling effect of such litigation." Id. at 566.

The court in Cervantes said: "Summary judgment ... is an extreme remedy ... but its extreme nature does not lighten the burden of a party against whom a motion therefore is interposed." 464 F.2d at 993 . The court further said, citing Konigsberg v. Time, Inc., 312 F.Supp. 848(S.D.N.Y. 1970) and Cerrito v. Time, Inc., 302 F.Supp. 1071, aff'd per curiam, 449 F.2d 303 (1971): "...a libel defendant's refusal to reveal the identity of its news sources need not bar the entry of summary judgment in its favor. Implicit in each of these cases is tacit approval of the contention that the free flow of news obtainable only from anonymous sources is likely to be deterred absent complete confidentiality." 464 F.2d at 992 n.9.

It is interesting to note that one of the many recent state libel cases requiring the threshold showing by the plaintiff in a summary judgment motion was handed down by the Idaho Supreme Court several weeks after the decision in this case.

Thus, in Bandelin v. Pietsch, 563 P.2d 395 (Idaho, 1977) the Idaho Supreme Court said: "Unless there is evidence which if believed by a jury would establish malice clearly and convincingly, a defendant is entitled to summary judgment" Id. at 399 .

VI. THE DEFENDANT NEWS ORGANIZATION AND NEWS REPORTER HAVE MADE A STRONG AND UNREBUTTED SHOWING OF REASONABLE JOURNALISTIC CARE WHICH SHOULD DEFEAT THE REQUEST FOR CONFIDENTIAL NEWS SOURCES.

Even the most cursory examination of the article in question (see A. App. A) and the deposition of the news reporter (see A. App. B) shows that the evidence submitted to the trial court on its face clearly raises a strong presumption that the article was written with care and not recklessly or maliciously.

The gist of the plaintiff's case is based partly on the conclusory statement by the unnamed police expert that the plaintiff narcotics agent's "justification for shooting didn't add up." See A. App. A.

A. Good Faith Reliance on Officials or Acknowledged Experts.

It is the contention of the appellants and the Amicus that the use of this statement was careful journalism under the New York Times rules because -- as the article pointed out -- this statement was corroborated by the State Attorney General, and the County Prosecutor (and also by the only eyewitnesses who were third-party strangers to the incident, unconnected to either the plaintiff or the victim).

The State Attorney General was quoted in the article as saying that the shooting was a "mistake" and that in all likelihood Caldero "got a little shook up."

The article quoted the County Prosecutor, who was familiar with the case, including records not available to the newspaper, that "knowing Dale [Johnson] I don't feel he is the sort who would try to run down a person. He just wanted out of there."

One eyewitness was quoted as saying that "he [Caldero] just ran up to the car and pumped three shots through the windshield." A second eyewitness was quoted as saying that at no time was Caldero in danger of being run down. Therefore, two acknowledged law enforcement officials and two eyewitnesses corroborated the conclusion of the unnamed police expert.

It is the position of the Amicus, based on the case law in this field, that there is a strong presumption of journalistic care raised by good faith reliance on public officials or known experts.

In Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976), The Detroit News published a letter from the State Attorney General to the legislature calling the plaintiff a "murderer", even though the murder conviction had been reversed. The Court of Appeals held that reliance by the newspaper on the state official was not reckless because of his "familiarity" with the case and because the newspaper "had no indication that the contents of the letter were in any respect untrue." Id. at 684.

In Time, Inc. v. McLaney, supra, defendant Life magazine called a public figure a "gambler", relying on a named official of Department of Justice. The court held that on its face this reliance was careful journalism because "in this case there is a complete absence of any indication that the writer of the article had any suspicion of the falsity of the statements made" to him by the Department of Justice official. Id. at 573. Therefore, the court placed the burden upon the plaintiff to show affirmatively some evidence of malice.

Similar holdings have come down from courts dealing with the question of newspapers relying

on an acknowledged expert. In Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977), Doubleday & Co. relied on a Spanish author who was an expert on Ernest Hemingway in publishing an unfavorable comment about another Hemingway expert who was an American. Pointing out that the book publisher exercised a reasonably careful judgment in relying on the Spanish Hemingway expert, the court granted summary judgment, holding: "Where there are no convicing indicia of unreliability, publication of the passage cannot constitute reckless disregard for the truth", Id. at 914. See also Fadell v. Minneapolis Star and Tribune, 425 F.Supp. 1075 (1976), aff'd ___F.2d___ [No. 77-1126 (7th Cir. 1977)]

Edwards v. National Audubon Society, ___F.2d ___(2d Cir. 1977) (2 Med.L.Rptr.1849 ,May 25, 1977) arose when The New York Times quoted officials at the New York Audubon Society that certain scientists were paid "liars" for the pesticide industry. The court granted summary judgment in favor of the Times saying that the Times had raised a strong presumption of care because it relied upon a "responsible prominent organization". 2 Med.L.Rptr. at 1853.

Therefore, we submit, reliance on official statements has raised a strong presumption of journalistic care which requires the public figure plaintiff to make some showing of malice before being granted the right to obtain the identity of confidential news sources in this case.

VII. ADDITIONAL EVIDENCE RAISING A STRONG PRESUMPTION OF JOURNALISTIC CARE BY THE NEWS REPORTER AND NEWS ORGANIZATION WAS UNREBUTTED BY THE PLAINTIFF.

This article was part of a six-part series published over a period of six months about the State Bureau of Narcoties and Organized Crime, a news issue which won an award as the most significant news event of the year.

The general conclusion of the articles was that agents were poorly trained and that there was poor management.

This conclusion was subsequently confirmed by two separate studies, one by LEAA and one by the Colorado Bureau of Investigation.

The news reporter interviewed 12 persons which included eyewitnesses, law enforcement officials, the victim, friends and family of the victim and the victim's attorney. (See A. Apps. B, C.) He obtained the permission of the State Attorney General and the local prosecutor to interview Caldero but, after waiting for more than two weeks, Caldero declined to be interviewed on the orders of this superior. (See A. App. B.) He gained limited access to some police reports, but many of the reports were denied to him.

Subsequently, Caldero was discharged from the agency, based primarily on the reports of the LEAA and the Colorado bureau which, in turn, reached the same conclusions as the newspaper articles.

In fact, the trial judge said that he was inclined to grant summary judgment were it not for the pendency of the pre-trial subpoena against the news reporter. Rp. Tr. 6, L.1-22; Joint App., p. 4a.

In addition, there does not appear to be any evidence alluded to in the plaintiff's motion for summary judgment raising any issue of malice or recklessness based on the investigation or writing of the article.

It is difficult for this Amicus to see how a small local newspaper, with limited resources, could have exercised more care than was exercised in the research and writing of this article.

CONCLUSION

WHEREFORE, the Amicus prays this Court to grant the petition for certiorari and to reverse the decision of the Idaho Supreme Court as violative of the First Amendment doctrines in Branzburg v. Hayes, Garland v. Torre and New York Times v. Sullivan;

Respectfully submitted,

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